

the defendant's claim to the proceeds of the Life Insurance policy.

In respect of her claim as assignee, there is a prior valid executed and fully constituted trust for value having been created in favour of the defendant prior to the assignment in her favour, the plaintiff could derive no benefit from the later purported absolute assignment.

In the circumstances appearing, and for the reasons set out above, I make the following orders:

- (a) That the sum of \$39,317.13 paid into court be paid out to the defendant;
- (b) That the plaintiff do pay to the defendant the costs of this action;
- (c) That the plaintiff do pay to The Great Eastern Life Assurance Company Limited, the Interpleader, the costs of the Interpleader proceedings herein.

*Order accordingly.*

Solicitors: *K.L. Rekhray & Co.; Allen & Gledhill.*

**PUBLIC PROSECUTOR v.  
MUHAMMAD SITUL B. SAHRI  
PUBLIC PROSECUTOR v. CHEW AH BAH**

[A.Cr.J. (Mohamed Azmi J.) July 10, 1981]

[Kuala Lumpur — Federal Territory Criminal Appeals  
Nos. 66 & 68 of 1981]

*Road Traffic — Driving Licence — Endorsement —  
"Special Reason" — Road Traffic Ordinance, 1958, s. 36(1).*

When a person is convicted under section 36(1) of the Road Traffic Ordinance, 1958, it is mandatory to order endorsement, but the court has a discretion to order otherwise if there is a special reason as opposed to a reason of general character. The reason must be special to the offence, that is, special to the facts which constitute the offence, and not special to the offender.

*Cases referred to:-*

- (1) *R. v. Crossan* (1939) N.I. 106.
- (2) *Whittall v. Kirby* (1947) 1 K.B. 194, 201.
- (3) *Re Kanapathipillai & Ors.* (1960) M.L.J. 243.

**MAGISTRATES' CRIMINAL APPEAL.**

*Gooi Soon Seng* (Deputy Public Prosecutor) for appellant in F.T.C.A. No. 66 of 1981.

*Phang Ah Hee* (Deputy Public Prosecutor) for appellant in F.T.C.A. No. 68 of 1981.

Respondents in F.T.C.A. No. 66 of 1981 and F.T.C.A. No. 68 of 1981 in person.

**Mohamed Azmi J.:** I have allowed both these appeals and I now proceed to give my reasons.

In these two cases, the Public Prosecutor had appealed against the decision of the Magistrate for failing to endorse the respondents' driving licence after they had pleaded guilty to driving their vehicles without due care and attention, an offence punishable under section 36(1) of the Road Traffic Ordinance, 1958.

In the first case, the respondent, Muhammed Situl

- A** bin Sahri, whilst overtaking a motor car collided into an oncoming motorcycle at Jalan Sentul, Kuala Lumpur, on March 14, 1980 at about 2.20 p.m. Whilst in the second case, the respondent, Chew Ah Bah, collided into the rear of another vehicle at Syed Putra Roundabout also at Kuala Lumpur on February 24, 1980 at about 6.45 p.m. In both cases, it would appear that the learned Magistrate had found some difficulties in interpreting the meaning of "special reason" found in section 36(2) of the Road Traffic Ordinance which provides:

"The court shall (unless for any special reason it thinks fit to order otherwise) order particulars of any conviction under this section to be endorsed on any driving licence held by the person convicted."

- C** What section 36(2) means is that the court has no discretion not to order endorsement unless there is special reason. It was Lord Goddard who first suggested in his address to Magistrates assembled at the Summer Assizes for Essex in 1937, that the reasons must be special to the offence and not to the offender. This suggestion was adopted by the King's Bench Division of Northern Ireland in *R. v. Crossan*.<sup>(1)</sup> Subsequently, in delivering the judgment of the Court of Criminal Appeal in *Whittall v. Kirby*,<sup>(2)</sup> the following test applied in *R. v. Crossan* was adopted by Lord Goddard in determining what in law amounted to a special reason:

- E** "A 'special reason' within the exception is one which is special to the facts of the particular case, that is, special to the facts which constitute the offence. It is, in other words, a mitigating or extenuating circumstance, not amounting in law to a defence to the charge, yet directly connected with the commission of the offence, and one which the court ought properly to take into consideration when imposing punishment. A circumstance peculiar to the offender as distinguished from the offence is not a 'special reason' within the exception."

- F** The principle enunciated in *Whittall v. Kirby* had been applied locally in *Re Kanapathipillai & Ors.*,<sup>(3)</sup> a case which all Magistrates are well advised to be familiar with. The law pertaining to endorsement of driving licence under section 36(2) Road Traffic Ordinance appears to be this. When a person is convicted under section 36(1), it is mandatory to order endorsement, but the court has a discretion to order otherwise if there is a special reason as opposed to a reason of general character. Further, the reason must be special to the offence, that is, special to the facts which constitute the offence, and not special to the offender.

- H** In the present appeals, in refusing to order endorsement, the learned Magistrate had accepted the following facts as constituting "special reasons":—

- (a) respondent was a first offender;
- (b) respondent was holding a provisional driving licence;
- I** (c) that the accident was caused by an error in the respondent's judgment of his distance from the oncoming motorcycle at the time of overtaking.

In the second case, the learned Magistrate had held the following factors as "special reasons":—

- (a) the respondent had been driving for the past ten years with a clean record;

- (b) the accident took place at a busy roundabout;
- (c) the main cause of the accident was the temporary lapse of attention by the respondent coupled with his eagerness to stay clear of traffic coming from the right.

It seems clear that none of the facts taken into consideration by the learned Magistrate could constitute a special reason in law. The fact that the respondents were first offenders or had been driving for years with a clean record, or that they were holders of provisional driving licence were facts of general character, and, even if they were of special character, they were merely special to the respondents and not facts special to the offence. Similarly, there was nothing special in the fact that respondent Muhammad Situl had committed an error of judgment when he overtook the other vehicle. Nor was there anything special in respondent Chew Ah Bah's temporary lapse of attention when he collided into the rear of another vehicle at a busy roundabout. Although an error of judgment or temporary lapse of attention had reference to the offence with which the respondents were charged, they were generally the most common cause of traffic accidents and they usually formed the basis for the offence of driving without due care and attention and, as such, they could not constitute special reasons within the meaning of section 36(2) Road Traffic Ordinance. In the circumstances, I allowed the appeals and ordered the driving licence of both respondents to be endorsed.

*Appeals allowed.*

## CHAN MUN POY v. DIRECTOR-GENERAL OF TELECOMMUNICATIONS & ANOR.

[O.C.J. (Wan Suleiman F.J.) January 24, 1981]

[Kuala Lumpur — Originating Motion No. 21 of 1979]

*Practice and Procedure — Mandamus — Leave of court necessary — Application for specific performance against public servant — Mandamus inapplicable — Rules of the High Court, 1980, O. 53 r. 1(1) — Specific Relief Act, 1950, ss. 44 to 49.*

*Telecommunications — Breach of contract alleged — Application for specific performance — Mandamus inapplicable to enforce civil liability — Specific Relief Act, s. 44 — Telephone Regulations 1956, r. 11.*

The applicant in the present case sought an order of mandamus under Specific Relief Act 1950, section 44 against the defendants to reinstall both the telephone line and the telephone at No. 42 Jalan Bawang, Kuala Lumpur. The applicant alleged that the respondents' servant or agent had wrongfully disconnected the telephone line and telephone on July 14, 1978, alleging that the applicant had installed an illegal extension, which the latter denied.

The applicant's requests, followed by those from his solicitor, for reinstallation had been ignored.

The respondents applied to have the application struck out on the ground that it was wrong in law. They objected on the ground that the applicant should have first obtained leave of the court before an order for mandamus could be sought.

**Held:** (1) since June 1, 1980, after the coming into force of the Rules of the High Court 1980, leave of court would

**A** be required under Order 53 rule 1(1) before an order for mandamus could be sought;

**B** (2) the applicant in this case had not succeeded in bringing his case under section 44 of the Specific Relief Act, 1950. His relationship with the respondents was merely contractual under an agreement made in accordance with Rule 11 of the Telephone Regulations 1956. If what he alleged was true, he would have his remedy in an action for breach of contract, and therefore not be able to assert that he had "no other specific and adequate legal remedy," a condition necessary to entitle a person to apply for relief under section 44(1) of the said Act;

(3) mandamus does not lie to enforce a civil liability arising out of a breach of contract to enforce rights based on contract.

*Case referred to:-*

**C** (1) *Koon Hoi Chow v. Pretam Singh* [1972] 1 M.L.J. 180.

### ORIGINATING MOTION.

*N.F. Cheong* (Miss) for the applicant.

*Stanley Isaacs* (Federal Counsel) (*Tee Ah Seng*, Federal Counsel with him) for the respondents.

**D** *Cur. Adv. Vult.*

**Wan Suleiman F.J.:** Chan Mun Poy @ Chan Kai New the applicant by way of originating motion had moved for an order pursuant to section 44 of the Specific Relief Act 1950 commanding respondents to reinstall both the telephone line and the telephone at No. 42, Jalan Bawang, Taman Cheras, Kuala Lumpur.

**E** In the supporting affidavit, he deposed that he was a subscriber of telephone No. 613619 which had been installed at the address mentioned above. On July 14, 1978 he said the respondents' servant or agent had wrongfully disconnected the telephone line and telephone, alleging that applicant had installed an illegal extension, an allegation which he denies. In support he attached to his affidavit copy of a letter from one of respondents' servants or agents who had removed the telephone the same day, which said that applicant had not used the Illegal Parallel Extension (whatever that might mean). Applicant's requests, followed by those from his solicitors, for reinstallation had been ignored.

**G** Encik Stanley Isaacs, Federal Counsel appearing for respondents responded by filing a notice of motion dated April 2, 1979, applying to have the application struck out on the ground that it is *inter alia* wrong in law.

**H** Firstly he submitted that under Order 59 rule 3 of the English Rules of the Supreme Court 1957 read together with Order 53 rule 1 of the Rules of the High Court 1957 leave of the court should be obtained before an order for *mandamus* could be sought. Since an application for an order under section 44 of the Specific Relief Act 1950 is in the nature of a *mandamus*, then applicant should first obtain leave of the court.

**I** It seems to me that an application for an order of *mandamus* then would come under sections 44 to 49 of the Act, and what counsel had said applies only to an application made in Malacca and Penang (see *Mallal's Rules of the Supreme Court* page 724) so that the requirement of leave would not apply. But